EMPLOYMENT TRIBUNALS

Claimant:		**Respondent:**
Mrs C Owen (deceased)	**v**	Mr D Pattni

Heard at: Reading (by CVP) **On:** 22 February 2021

Before: Employment Judge Hawksworth
Members: Mrs AE Brown and Ms H Edwards

Appearances
For the Claimant: Mrs J Coote (lay representative)
For the Respondent: Mrs D McGuire (legal consultant)

The remedy judgment of 22 February 2021 having been sent to the parties on 4 March 2021 and reasons having been requested by the claimant's representative on 15 March 2021 in accordance with rule 62(3) of the Employment Tribunal Rules of Procedure 2013, the following reasons are provided:

REASONS

Introduction

1. In our liability judgment of 18 October 2019 we found that Mr Pattni subjected Mrs Owen to discrimination arising from disability in two respects:

    a) failing during the period from 3 to 15 November 2016 to pay monies owed to Mrs Owen; and
    b) dismissing her on 15 November 2016

2. At the time of the liability judgment, the claimant's representative Mrs Coote made a written application for a preparation time order.

3. The hearing on 22 February 2021 was the remedy hearing to decide what compensation should be awarded to Mrs Owen's estate in respect of that judgment and to decide Mrs Coote's application for a preparation time order. Two earlier remedy hearings had been postponed at Mr Pattni's request because of ill-health.

4. At the hearing we had a 68 page bundle of documents prepared by Mrs Coote, a separate 38 page bundle of the respondent's documents, and a supplemental bundle of 16 pages prepared by Mrs Coote in response to the respondent's documents.

5. Mr Pattni had prepared a witness statement and we heard his evidence on remedy issues. Mrs Coote and Mrs McGuire made submissions, following which we gave judgment.

6. In our reasons, we first considered the compensation which should be awarded. A schedule of loss was prepared on Mrs Owen's behalf on 30 July 2017. It included compensation sought in respect of her complaints of unfair dismissal, breach of contract and unpaid holiday pay against a previous respondent, Rogers Auto Factors Limited. Those complaints were dismissed on withdrawal. An updated scheduled of loss was served on 9 September 2019, seeking compensation for injury to feelings and aggravated damages. We have dealt with those two elements in turn. There is no claim against Mr Pattni for compensation for financial losses arising from the discrimination.

7. Finally, we consider the application for a preparation time order.

Injury to feelings

8. Under section 124(2)(b) of the Equality Act 2010, where a tribunal finds that there has been a contravention of a relevant provision, it may order the respondent to pay compensation to the claimant. The compensation which may be ordered corresponds to the damages that could be ordered by a county court in England and Wales for a claim in tort (section 124(6) and section 119(2)). There is no upper limit on the amount of compensation that can be awarded.

9. In Vento v Chief Constable of West Yorkshire Police (No. 2) [2003] IRLR 102 the Court of Appeal identified three broad bands of compensation for injury to feelings awards. The lower band applies in less serious cases. The middle band applies in serious cases that did not merit an award in the upper band. The upper band applies in the most serious cases (with the most exceptional cases capable of exceeding the upper band).

10. We were referred by the respondent's representative to principles set out in the case of HM Prison Service v Johnson, [2002] IRLR 697, a decision of the EAT, which were approved by the Court of Appeal in Vento. Injury to feelings awards are compensatory, not punitive. This means they are designed to compensate the injury party fully, not to punish the guilty party. They should be just to both parties, neither too low nor excessive. In exercising their discretion in assessing a sum, tribunals should remind themselves of the value in everyday life of the sum they have in mind. This may be done by reference to purchasing power or by reference to earnings.

11. We were also referred to Orlando v Didcot Power Station Sports and Social Club 1996 IRLR 262 in which the EAT held that an employment tribunal was permitted to find that the loss of a part-time job could result in a lower level of compensation for injury to feelings than would be the case following the loss of a full-time career. The rationale behind such a distinction was that losing a full-time career was more disruptive to an individual's life than losing a part-time job. The EAT stressed, however, that such a finding would depend upon the facts of the particular case. Tribunals should not make generalised assumptions about the importance that individuals attach to part-time jobs.

12. We set out the facts including those found in our liability judgment which are relevant to our assessment of injury to feelings.

13. The discrimination which Mrs Owen experienced from Mr Pattni came at a very difficult time for her. She had been treated for an acute form of leukaemia requiring a lengthy period of chemotherapy and major transplant surgery. Clearly, having to cope with additional concerns arising from discrimination at work made her situation worse.

14. In our liability judgment, we found that Mrs Owen was shocked and extremely upset by the letter she received from the pension provider on 3 November 2016. She felt totally humiliated and undervalued as an employee. This was particularly so given that Rogers Auto Factors Limited had been founded by her father and she felt a close affiliation to the company. Mr Pattni's failure to respond to her letter of 3 November 2016 about her pension exacerbated her stress levels. In her email of 16 November 2016 Ms Owen said that Mr Pattni's actions had made it very clear that he did not consider her to be an employee of the company, he had totally ignored her since she became ill, and this had upset her very much.

15. Although Mrs Owen worked part-time at the time of her dismissal, this is not a case where the circumstances were such that her part-time status at that time meant that her feelings were not as injured as if she had worked full-time. In this case, Mrs Owen's job with Rogers Auto Factor was one that she had had for the whole of her working life, from when she started as an apprentice at 17, for 24 years. It was her family's business. The principle set out in Orlando v Didcot Power Station remains very much dependent on the facts of the particular case. We find that the fact that Mrs Owen's job was part-time did not, in the particular circumstances of her case, reduce the injury to her feelings.

16. For these reasons, we have concluded that the circumstances of this case are such that it was a serious case meriting an award in the middle of the middle Vento band.

17. The middle Vento band originally ran from £5,000 to £15,000. This claim was presented on 3 April 2017. The Presidential Guidance of 5 September 2017 deals with uprating of the Vento bands to take account of inflation since the judgment in Vento. The guidance says that in respect of claims

presented before 11 September 2017, an employment tribunal may uprate the bands for inflation by applying the formula x divided by 178.5 multiplied by z, where x is the relevant boundary of the relevant band in the original Vento decision and z is the appropriate value from the RPI All Items Index for the month and year closest to the date of presentation of the claim.

18. Where the claim falls for consideration after 1 April 2013, an uplift of 10% is then applied. This is based on the decision in De Souza v Vinci Construction (UK) Ltd [2017] EWCA Civ 879 in which the Court of Appeal ruled that the 10% uplift to general damages in all civil claims for pain and suffering, loss of amenity, physical inconvenience and discomfort, social discredit or mental distress provided for in Simmons v Castle should also apply to employment tribunal awards of compensation for injury to feelings and psychiatric injury.

19. We conclude that, as the claim was presented in 2017, it would be appropriate to uprate the Vento bands in this case, to take account of inflation.

20. The RPI all items index for April 2017 (z in the formula) is 270.6.

21. Applying the formula set out in the Presidential Guidance to the boundaries of the middle Vento band (£5,000 and £15,000) gives:

    a) £5,000/178.5 x 270.6 = £7,579.83 (for the bottom of the band) and
    b) £15,000/178.5 x 270.6 = £22,739 (for the top of the band).

22. Therefore, the Vento middle band uprated for inflation as at April 2017 is £7,579 to £22,739. The middle of the band is around £15,100.

23. We have decided that it is appropriate to make an award of £15,000, broadly the middle of the Vento middle band.

24. Applying the Simmons v Castle 10% uplift to an award of £15,000 gives a total injury to feelings award of £16,500.

25. We have decided on this award having reminded ourselves of the value in everyday life of this sum, as set out in the HM Prison v Johnson.

Interest on injury to feelings award

26. It is appropriate to make an award of interest under the Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996. The rate of interest is 8%.

27. For injury to feelings awards, Regulation 6(1)(a) provides that the period of the award of interest starts on the date of the act of discrimination complained of and ends on the day on which the employment tribunal calculates the amount of interest ('the day of calculation').

28. In Mrs Owen's case, the discrimination took place between 3 and 15 November 2016. The period of interest on the injury to feelings award is from 3 November 2016 to 22 February 2021 which is 1572 days.

29. The daily interest payable on the injury to feelings award is £16,500 x 0.08/365. The award of interest is 1572 x (£16,500 x 0.08/365) = £5,685.04.

30. The total award for injury to feelings is therefore £22,185.04 of which £5,685.04 is interest.

Aggravated Damages

31. Compensation may also include an award in respect of aggravated damages. Aggravated damages may be awarded in cases where the respondent has behaved in a 'high-handed, malicious, insulting or oppressive manner in committing the act of discrimination'. Aggravated damages have been considered to be a sub-heading of injury to feelings. They are also compensatory not punitive.

32. In Commissioner of Police of the Metropolis v Shaw EAT 0125/11, Mr Justice Underhill (then President of the EAT) set out three broad categories of case in which aggravated damages might be awarded. One is where subsequent conduct adds to the claimant's injury, for example where the respondent conducts tribunal proceedings in an unnecessarily offensive manner or 'rubs salt in the wound' by plainly showing that it does not take the claimant's complaint of discrimination seriously.

33. In our liability judgment, we found that an email was sent to the tribunal on 7 June 2017, the evening before a preliminary hearing was conducted. It was sent on behalf of Rogers Auto Factors Limited (which was then still a respondent). It was signed in Mr Pattni's name and said:

> *"If we cannot reach an amicable resolution to this matter, then Rogers Auto Factors Limited will cease to exist and there will be no positive outcome for any party."*

34. In our liability judgment we accepted the evidence in Mrs Owen's witness statement that she understood this as a deliberate attempt to prevent her from pursuing her claim, and to avoid having to pay any award which was made to her.

35. We have concluded that the email from Mr Pattni and the concerns it caused Mrs Owen added to her injured feelings, causing injury over and above the injury caused by the discrimination itself. We have taken into account Mrs Owen's very serious health condition at the time the email was sent, and her close family affiliation with Rogers Auto Factors Limited.

36. An additional award of aggravated damages should be made against Mr Pattni. We have concluded that an award of aggravated damages of £2,000 is appropriate.

37. We consider that the total award for injury to feelings together with aggravated damages is fair and proportionate. It is still within the uprated Vento middle band.

Interest on aggravated damages

38. For interest on aggravated damages, Regulation 6(1)(b) provides that the period of the award of interest starts on the date which is the midpoint between the act of discrimination complained of and the day of calculation, and ends on the day of calculation.

39. In Mrs Owen's case, the number of days between the midpoint of 3 November 2016 and 22 February 2021 and 22 February 2021 itself is 1572 divided by 2 which is 786 days.

40. The daily interest payable on the award of aggravated damages is £2,000 x 0.08/365. The award of interest is 786 x (£2,000 x 0.08/365) = £344.55.

41. The total award of aggravated damages and interest is £2,344.55 of which £344.55 is interest.

Summary of compensation

42. The total sum payable by Mr Pattni is £24,529.59.

43. The updated schedule of loss included a tribunal issue fee of £250. If this has not already been recovered from HM Courts and Tribunals Service, an application for recovery can be made via the online form at:

https://www.gov.uk/employment-tribunals/refund-tribunal-fees

Application for preparation time order

44. An application for a preparation time order has been made by Mrs Coote. Mrs Coote is a lay representative.

45. The power to award costs and to make preparation time orders is set out in rules 74 to 79 of the Employment Tribunal Rules of Procedure 2013. Unlike in civil litigation where the successful party can expect to recover some or all of their costs from the unsuccessful party, in the employment tribunal the general position is that parties bear their own costs, unless one of the grounds for making a costs or preparation time order is made out and the tribunal decides to exercise its discretion to make an award of costs.

46. Orders for costs and preparation time in the employment tribunal remain the exception rather than the rule.

47. A preparation time order is defined in rule 75(2) as:

> *"an order that a party ('the paying party') make a payment to another party ('the receiving party') in respect of the receiving party's preparation time while not legally represented…"*

48. Preparation time is defined as 'time spent by the receiving party (including by any employees or advisers) in working on the case, except for time spent at any final hearing'.

49. Under rule 76(1) a tribunal may make a preparation time order, and shall consider whether to do so, where it considers that:

> *"(a) a party (or that party's representative) has acted vexatiously, abusively, disruptively or otherwise unreasonably in .... the way that the proceedings (or part) have been conducted*; or
> *(b) any claim or response had no reasonable prospect of success*."

50. Rule 76(2) provides:

> "*A tribunal may also make such an order where a party has been in breach of any order or practice direction or where a hearing has been postponed or adjourned on the application of a party."*

51. Rules 74 to 78 provide for a two-stage test to be applied by tribunals in considering preparation time applications under Rule 76. The first stage is for the tribunal to consider whether the ground or grounds put forward by the party making the application are made out. If they are, the second stage is for the tribunal to consider whether to exercise its discretion to make an award of preparation time, and if so, for how much.

52. Our conclusion on the first part of the test is that Mr Pattni's conduct of the proceedings was unreasonable and was in breach of tribunal orders. He failed to comply with orders of the tribunal, in particular he failed to disclose any documents prior to the liability hearing. He only disclosed documents and his witness statement for the remedy hearing on the working day before the hearing, even though the hearing had been postponed twice.

53. However, at the second stage, we have decided not to exercise our discretion to make an award of costs for the following reasons:

    a) orders for costs and preparation time in the employment tribunal are the exception rather than the rule;
    b) the respondent was a litigant in person for much of the proceedings, he only instructed legal representatives to represent him at the hearings;
    c) importantly, we do not consider that Mr Pattni's delays and failures to comply with orders led to additional time by the claimant's representative over and above what would have had to be done anyway.

54. We have therefore decided not to make a preparation time order.

Employment Judge Hawksworth

Date: 22 March 2021

Sent to the parties on: 27 April 21

For the Tribunals Office